86-738

No. _____

In the

Supreme Court of the United States

Fall Term 1986

CAUCUS DISTRIBUTORS, INC., et. al.,
Petitioners

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST DISTRICT

MATTHEW FEINBERG
Segal, Morgan & Feinberg
210 Commercial Street
Boston, Massachusetts 02109
(617) 720-4444

QUESTIONS PRESENTED

1. Whether a motion filed within ten days of a contempt judgment which requests that the judgment be vacated is a motion under F.R.Civ.P. 59(e) which extends the time for appeal pursuant to F.R.App.P. 4(a)(4)?

2. Whether a party may be held in contempt without being afforded an evidentiary hearing where the party specifically requests such a hearing in order to present evidence that the documents which it has been ordered to produce are not within its control but rather are the personal property of other individuals.

PARTIES

The parties* to the proceeding in the Court of Appeals are as follows:

Caucus Distributors, Inc.; Campaigner Publications, Inc.; National Democratic Policy Committee; Fusion Energy Foundation; United States of America.

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* Pursuant to Supreme Court Rule 28.1, the corporations herein, Caucus Distributors, Inc., Campaigner Publications, Inc., Fusion Energy Foundation, represent to this Court that they have no parent companies, subsidiaries, or affiliates.

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* The Judgments and Commitments for each of the four petitioners are identical, except for the names, and therefore only one is reproduced in the Appendix.

TABLE OF AUTHORITIES

In the

Supreme Court of the United States

Fall Term 1986

No. _____

In Re *Grand Jury* Proceedings.
CAUCUS DISTRIBUTORS, INC., et. al.,
Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST DISTRICT

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 795 F.2d 226 (1st Cir. 1986), and appears in the appendix hereto at A-1.

The opinion of the United States Court of Appeals for the First Circuit denying the petition for rehearing was issued on August 5, 1986, and appears in the appendix hereto at A-17.

Jurisdiction

The Order of the Court of Appeals which is sought to be reviewed was entered on July 3, 1986. Petitioners' petition for rehearing was denied by Order dated August 5, 1986, and this Petition for Writ of Certiorari is timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

Constitutional Provisions and Rules Involved

United States Constitution, Amendment Five:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Appellate Procedure, Rule 4(a)(4):

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect.

Statement of the Case

During January 1985, subpoenas were issued seeking documents from the petitioners in connection with a federal grand jury investigation into alleged fraudulent credit card activities. When representatives of the petitioners did not appear before the grand jury, the government moved for an order to show cause in the United States District Court for the District of

Massachusetts. The district court thereupon issued the order and scheduled a contempt hearing for March 29, 1985.

On March 29, 1985, the district court, in the absence of any of the petitioners, entered a Judgment and Commitment holding each of the petitioners in contempt for failure to comply with the grand jury subpoenas, and imposed a fine of $10,000 per day on each petitioner until compliance was achieved. (App., A-19). The order was stayed until 12:00 noon on April 2, 1985. Jurisdiction in the District Court was predicated on 28 U.S.C. Section 1826 and F.R.Civ.P. 17(g).

On April 3, 1985, petitioners filed a motion to vacate the contempt order and to quash the grand jury subpoenas, alleging a failure to properly serve the grand jury subpoenas and lack of notice of the contempt hearing. This motion was denied that same day by the district court. On the next day, April 4, petitioners filed a motion to purge the contempt and sanctions. In that motion, the petitioners requested that the contempt order be vacated. The petitioners stated that while they continued to assert their claims that proper service of the subpoenas was never made, and that they were never served with notice of the March 29 contempt hearing, they would now accept service of the subpoenas. On April 9, 1985, the district court noted on the above motion that it was deferring action on this motion based on petitioners' acceptance of service and request for a reasonable time to respond to the subpoenas. (App., A-21). The district court has never entered an order denying petitioners' April 4 motion.

On April 8, 1985, the government filed a motion for partial judgment against each petitioner, seeking an order of partial judgment on the contempt sanctions as to each. On April 22, 1985, without hearing or further action on petitioners' motion to purge, the district court entered an Order of Partial Judgment as to each petitioner in the sum of $70,000, covering the period from April 2–8, 1985.

On May 2, 1985, petitioners filed a motion for reconsideration of the April 22 partial judgments. On July 19, 1985, the district

court denied this motion, as well as two other motions which had been filed in the interim. Petitioners thereupon filed, on August 2, 1985, a notice of appeal with respect to the March 29, 1985, contempt judgments, the orders of partial judgment, and two other matters. On December 4, 1985, the Court of Appeals for the First Circuit dismissed a portion of petitioners' appeal upon the government's motion.

While this initial appeal was pending, the district court entered a second order of partial judgment for $150,000 with respect to petitioner Caucus Distributors, Inc. ("CDI"). CDI took a timely appeal of this order, and this appeal was consolidated with the initial appeal.

Also during the pendency of the above appeals, the grand jury sought to require CDI to produce "index cards" which a witness had testified were maintained by certain independent consultants who provided services to CDI. When the government insisted that CDI produce said index cards, CDI filed a motion for a protective order on the ground, *inter alia*, that the index cards were not the property of CDI, but rather were the personal property of the consultants who maintained them. At the same time that this motion was filed, the government moved for an order to compel production of the cards.

On November 22, 1985, the district court, without holding an evidentiary hearing, denied CDI's motion for a protective order, and also entered an order compelling CDI to produce the index cards. (App., A-23).

On December 10, 1985, the government filed a motion for further sanctions against CDI based on its alleged continued contempt for failure to produce all index cards to the grand jury. CDI filed an opposition, stating, *inter alia*, that in response to the November 22 order, its Keeper of the Records appeared before the grand jury with several thousand index cards. However, CDI stated, additional index cards were not produced because many of the independent consultants had refused to turn over their cards to CDI to produce to the grand jury. Attached to CDI's opposition were letters from several attorneys representing the consultants who stated their clients' position

that they considered the index cards to be their personal property. In its opposition, CDI also stated its desire for an evidentiary hearing in which it would call as witnesses several of the consultants who refused to turn over their cards to CDI.

Oral argument was heard on the government's motion for further sanctions on January 17, 1986. At that hearing, the district court specifically rejected CDI's request for an evidentiary hearing in which it would produce as witnesses several of the independent consultants. The government's motion was thus granted without an evidentiary hearing, and an Order for Further Judgment and Commitment was entered by the district court on January 22, 1986, increasing the contempt sanctions against CDI by the sum of $5,000 per day. (App., A-24). A timely notice of appeal was filed by CDI, and this appeal was consolidated with the two prior appeals.

On July 3, 1986, the Court of Appeals affirmed the judgments of contempt and the orders of partial judgment. (App., A-1). Petitioners' timely petition for rehearing was denied on August 5, 1986. (App., A-17).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Incorrectly Held That A Motion Filed By Petitioners Within Ten Days Of The Contempt Judgment Did Not Extend The Time For Appeal, And Thus Improperly Avoided Reaching The Merits Of The Issue Of The Sufficiency Of The Service Of Process Which Underlied The Contempt Judgment.

The primary issue raised in petitioners' appeal to the Court of Appeals was whether the petitioners were properly served with the grand jury subpoenas and with notice of the March 29, 1985, contempt hearing. That issue was fully briefed by both sides, and was the focus of oral argument before the Court of Appeals. However, that court utilized a procedural technicality to avoid reaching the merits of that issue, and thus rejected petitioners'

appeal. This Court should not permit such a result where petitioners have raised an issue as fundamental as the validity of the service which underlies a contempt ruling potentially costing the petitioners hundreds of thousands of dollars.

In its opinion, the court of appeals held that petitioners' April 4, 1985, motion to purge contempt was not a motion under F.R.Civ.P. 59(e) which would serve to toll the time for appeal under Fed.R.App.P. 4(a)(4). Therefore, the court held that the appeal of the March 29 contempt judgment was not timely, and that petitioners could not raise the service of process issue in connection with their timely appeal of the April 22 and November 22 partial judgments which were based on the original contempt orders. (App., A -5, 9). Such a holding is an improper and overly technical reading of the rule, and this Court should not permit the court below to avoid a decision on the merits of petitioners' claims in such a manner.

Federal Rule of Appeallate Procedure 4(a)(4) provides that

> [i]f a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.

It has been held that substance controls in determining whether a post-judgment motion is a motion to alter or amend the judgment under Rule 59(e), *Sunstream Jet Express, Inc. v. International Air Service Co., Ltd.*, 734 F.2d 1258, 1273 (7th Cir. 1984), and that nomenclature is not controlling. *Bordallo v. Reyes*, 763 F.2d 1098, 1101 (9th Cir. 1985). The motion need not make reference to Rule 59, *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1419 (9th Cir. 1984), and, in fact, courts have held postjudgment motions that were labeled as Rule 60(b) motions to have actually been Rule 59(e) motions

which tolled the appeal period. *Dove v. Codesco*, 569 F.2d 807, 809 (4th Cir. 1978); *Alley v. Dodge Hotel*, 551 F.2d 442, 444 (D.C. Cir. 1977); *Vreeken v. Davis*, 718 F.2d 343, 345 (10th Cir. 1983). "In essence, . . . the issue is whether the motion, if granted, would affect the finality of the court's disposition of the case." *St. Paul Fire & Marine Insurance Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982).

In the present case, while petitioners' April 4 motion was styled a "Motion to Purge Contempt and Sanctions", what it specifically asked the district court to do was to *vacate* the contempt order and the sanctions. *See St. Paul & Marine Insurance Co. v. Continental Casualty Co.*, *supra* at 693 (motions to alter or amend judgment may properly be cast in the form of a motion to reconsider, to vacate, to set aside, for reargument or for rehearing); *Vreeken v. Davis*, *supra* at 345 (motion to vacate judgment may constitute motion to "alter or amend" within meaning of Rule 59 (e)). Contrary to the court of appeals' opinion (App. A-5), the motion *was* meant to alter the judgment, and was not a mere "attempt to obey the contempt order and stop the accumulation of the fine." Petitioners were not seeking a cessation of further sanctions based on their compliance, but rather were seeking the "substantive change of mind by the court" which is the hallmark of a Rule 59(e) motion. *Bordallo v. Reyes*, 763 F.2d at 1102. While a true motion to purge would seek a cessation of sanctions based on the fact of compliance, petitioners' motion instead sought to *vacate* both the contempt judgment and sanctions. Clearly, if the motion had been granted, there would have been no need for, nor any basis for, an appeal by petitioners.

It has been held that

> [p]ost-judgment motions filed within 10 days should where possible to construed as Rule 59(e) motions to avoid otherwise endless hassles over proper characterization.

Western Industries, Inc. v. Newcor Canada, Ltd., 709 F.2d 16, 17 (7th Cir. 1983). *See also Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d at 1419 ("[w]e have consistently held

that if a motion is served within ten days of judgment and it could have been brought under Rule 59(e) it tolls the time for appeal although it does not expressly invoke Rule 59"); 9 Moore's Federal Practice Para. 204.12[1] at 4–67 (1985) ("a motion labeled under Rule 60(b) but filed within 10 days after the entry of the judgment is pro tanto a motion under Rule 59(b) or (e), and the appeal time runs from the date of the order disposing of the motion").

Petitioners' motion was filed within 10 days of the contempt order, and clearly sought to alter or amend the judgment. In their motion, petitioners sought to preserve the service issue, but also sought to have the contempt judgment vacated based on expected future compliance. Failing to hold that this motion tolled the appeal period ignores the admonition that

> courts examine the real nature of motions so as to sustain jurisdiction on appeal even where it is not altogether free of doubt. . . . This comports with the policy of liberally construing the Federal Rules of Appellate Procedure to carry out Congress' desire for fairness in the administration of justice and a just determination of litigation.

Bordallo v. Reyes, 763 F.2d at 1102.

It is therefore clear that in ruling that petitioners' motion to purge did not toll the time for appeal, the court of appeals misapprehended the real nature of appellants' motion and the case law interpreting F.R.A.P. 4. This motion tolled the appeal period *at least* until the district court denied petitioners' pending motions on July 19, 1985, and the August 2, 1985 appeal of the contempt judgment was thus timely.

In *Foman v. Davis*, 371 U.S. 178 (1962), this Court expressed its disapproval of the use of procedural technicalities to avoid decisions on the merits. *Foman* involved a premature notice of appeal of a judgment of dismissal, followed by the issuance of subsequent post-judgment orders, and finally a notice of appeal which specified only the post-judgment orders and not the original judgment. Although the parties briefed and argued the

merits of the original dismissal as well as the post-judgment motions, the Court of Appeals for the First Circuit dismissed the appeal from the original judgment on the ground that the second notice failed to specify that the appeal was being taken from the judgment as well as from the later orders.

On a petition for certiorari, this Court reversed the dismissal. In language pertinent to the present case, the Court stated that "[t]aking the two notices and the appeal papers together, petitioners' intention to seek review of both the dismissal and the denial of the motions was manifest." *Id.* at 181. The Court continued:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'

Id. at 181–182 (citation omitted).

In the present case, it was clearly petitioners' intention to preserve the service of process issue for appeal. The issue was briefed by all parties, and was the focus of the Court's attention during oral argument. Petitioners raised the issue on several occasions before the district court, and only took an appeal when the court's rulings made it clear that the contempt order and initial monetary sanctions would stand. It would be manifestly unfair to read the appellate rules in such a manner so as to foreclose a decision on the merits of the appeal, and this Court should not permit such a result to stand. Since proper service of process is necessary to confer personal jurisdiction on a court, *F.T.C. v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1319 (D.C. Cir. 1980), and since "[a] judgment entered against parties not subject to the personal jurisdiction of the rendering court is a nullity", *Covington Industries, Inc. v. Resintex, A.G.*, 629 F.2d 730, 732 (2d Cir. 1980), the con-

tempt judgment and subsequent partial judgments are dependent on the propriety of service, and that issue should have been decided by the court of appeals.

II. In Upholding The District Court's Order Holding Petitioner CDI In Further Contempt Without Granting CDI An Evidentiary Hearing On A Contested Factual Issue Relating To CDI's 'Just Cause' Defense To Its Noncompliance With An Order To Produce Documents, The Court Of Appeals Sanctioned A Violation Of Petitioner's Right To Due Process.

Petitioner CDI's appeal of the January 22, 1986 Order for Further Judgment and Commitment raised the issue of whether CDI was improperly denied an evidentiary hearing before being adjudged in civil contempt. In upholding the district court's contempt judgment, the court of appeals, in effect, affirmed a violation of petitioner's right to due process, and such a ruling should not be allowed to stand Petitioner's right to due process was violated because it was adjudged in contempt of an order to compel the production of documents without being allowed an evidentiary hearing at which it could present its "just cause" defense to noncompliance with the court order.

The issue that prompted petitioner's request for an evidentiary hearing was the district court's determination that index cards subpoenaed by the grand jury were corporate records and thus subject to their reach. In response to the government's motion to compel the index cards, petitioner moved for a protective order, asserting that the cards were not corporate records and were protected from compelled disclosure by the first and fifth amendment rights of their owners. In addition to this motion, petitioner had submitted affidavits and letters as documentary evidence that the index cards were personal property outside the reach of the grand jury subpoena. On November 22, 1985, the District Court denied the motion for a protective order and granted the government's motion to compel because it found the index cards to be corporate records and thus cov-

ered by the grand jury subpoena. (App., A-23). The government then moved for further sanctions based on an alleged failure to comply with this Order, and in its opposition, petitioner requested an evidentiary hearing to call witnesses and present its defense to noncompliance with the order. The court denied this request, and petitioner was held in contempt and fined for each day of noncompliance. (App., A-24).

In affirming the contempt judgment, the court of appeals concluded that petitioner's due process rights were not violated by the denial of an evidentiary hearing because the basic position of the potential witnesses had been set out in the affidavits submitted. (App., A-16). The court of appeals admitted, however, that this was a close case. (App., A-15). Considering the potential violations of constitutional rights of petitioner and persons not even parties to the grand jury investigation, as well as the substantial cost to petitioner, due process requires that petitioner be allowed to present its "just cause" defense through an evidentiary hearing.

It has been held that party to a civil contempt proceeding has a due process right to an "uninhibited adversary hearing" at which he must "be allowed to probe all nonfrivolous defenses to the contempt charge." *United States v. Alter*, 482 F.2d 1016, 1024 (9th Cir. 1973); *Matter of Kitchen*, 706 F.2d 1266, 1273 (2d Cir. 1983). That right includes an opportunity to present evidence and call other witnesses in its behalf. *In Re Oliver*, 333 U.S. 257, 273–275 (1948). "[F]ailure to afford the petitioner a reasonable opportunity to defend himself . . . [is] a denial of due process of law." *Id.* at 273.

In the present case, Petitioner, having raised the defense that it did not have possession or control over the documents in question because they were the personal property of others, and having submitted documentary evidence to support that defense, requested an evidentiary hearing to present witnesses and further evidence on the question of ownership or control over these documents. This is by no means a frivolous defense, but goes to the very heart of why petitioner was unable to comply with the court order. *See Fremont Energy Corp. v.*

Seattle Post Intelligencer, 688 F.2d 1285, 1287 (9th Cir. 1982) (party must be provided an opportunity to show "adequate excuse" for noncompliance with subpoena).

The determination which resulted in the contempt judgment in the present case was based on motion papers, affidavits, and letters. This is certainly not what is contemplated by an "uninhibited adversary hearing." *See United States v. Alter*, 482 F.2d at 1024 (hearing largely confined to the perfunctory reception of affidavits, a round of oral argument and some offers for the record is not the uninhibited adversary hearing contemplated by section 1826(a)). This Court has also recognized that "a hearing and only a hearing will elucidate all the facts and assure a fair administration of justice." *Harris v. United States*, 382 U.S. 162, 169 (1965). Therefore, the contempt judgment should be reversed because petitioner was denied an evidentiary hearing where it would be allowed a "meaningful opportunity to present its defense." *United States v. Boe*, 491 F.2d 970, 971 (8th Cir. 1974).

In a case of civil contempt, "if it can be shown that [petitioners] did present a genuine issue of fact regarding their . . . inability to comply with the District Court's orders, they [have] a due process right to a full, impartial hearing with . . . an opportunity to present this defense." *Brotherhood of Loc. Fire & Eng. v. Bangor & Aroostook R. Co.*, 380 F.2d 570, 578 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 970 (1967). By way of analogy, the Ninth Circuit's discussion in *Cohen v. United States*, 378 F.2d 751 (9th Cir. 1967) is instructive in determining the threshhold when an evidentiary hearing is required. In that case, the appellant raised allegations of illegal monitoring of telephone calls, the result of which led to his indictment on gambling charges. In determining the requisite specificity required to warrant an evidentiary hearing on the allegations, the Ninth Circuit stated:

> The question is whether the allegations in the moving papers, including affidavits if any are filed, are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that a substantial claim

> is presented. If the allegations are sufficient, and factual issues are raised, a hearing is required.

378 F.2d at 761.

Applying the Ninth Circuit's standard here, it is clear that petitioner was entitled to an evidentiary hearing. The petitioner's moving papers, affidavits and letters were sufficiently detailed in presenting its defense of noncompliance with the court order to enable the court to conclude that a substantial claim was presented. For example, the affidavits were of the individual owners of the index cards in question, and made clear that the index cards are maintained and controlled by them; one affidavit also states that the affiant does not make the names of his associates which are maintained on the cards available beyond his personal use. These are significant factors indicating that these cards are the personal property of the individual owners rather than corporate records of the petitioner. *See Grand Jury Subpoena Duces Tecum Witness v. United States*, 657 F.2d 5, 8 (2d Cir. 1981).

At the very least, the documentary evidence submitted to the district court presented a substantial question concerning whether the documents at issue were corporate records of petitioner which petitioner was required to produce to the grand jury. If said documents were not petitioner's records and thus were not within petitioner's possession, custody, or control, petitioner would have had "adequate excuse" or "just cause" for failing to produce the documents pursuant to the grand jury subpoena and the court's order, and it could thus not properly be held in continuing contempt for its failure to produce. *See Fremont Energy Corp. v. Seattle Post Intelligencer*, 688 F.2d 1285, 1286–1287 (9th Cir. 1982); *United States v. Powers*, 629 F.2d 619, 629 (9th Cir. 1980); Fed.R.Cr.P. 17(g). It is clear that a hearing was required to allow petitioner to present all the evidence to determine the factual issues raised. Only an evidentiary hearing could have provided the court with full insight and understanding to make a fair decision. *See Harris v. United States*, *supra* at 169.

Furthermore, the denial of an evidentiary hearing will violate the constitutional rights of the owners of the index cards without allowing them a due process right to be heard. The issue of whether the index cards are corporate records or personal property has not been fairly settled. For example, the affidavits submitted by petitioner assert that the subpoenaed index cards are the respective affiants' personal property. Both the affidavits and letters submitted to the court by petitioner express concern that the constitutional rights of the owners will be violated if they are forced to produce their personal property to the grand jury. The index cards contain names of political associates of the owners and, by compelling the production of these cards, the First Amendment right to free political association will be infringed. The breach of confidentiality and trust by the owners of the cards to the persons named on those cards will have an adverse effect on their political associations.

In addition, the compulsion of the index cards potentially violates the Fifth Amendment rights of the owners. By requiring petitioner to obtain the personal property of the individual owners and turn it over to the grand jury, the government would be permitted to obtain the records at issue through a subpoena to petitioner and, in effect, negate any potential Fifth Amendment claims the individual owners might possess. It is well settled that the Fifth Amendment privilege against self-incrimination does not extend to corporations. *Grand Jury Subpoena Duces Tecum Witness v. United States*, *supra*, 657 F.2d at 6. "[T]he Fifth Amendment prevents the government from subpoenaing an individual's incriminating papers that are in his possession and are held by him in an individual, as opposed to representative capacity." *United States v. (under seal)*, 745 F.2d 834, 840 (4th Cir. 1984). If petitioner were required to obtain these documents from the individual owners and turn them over to the grand jury, these individuals would be prevented from claiming whatever protections might be afforded them by the Fifth Amendment.

From all the foregoing, it is evident that the court of appeals should have reversed the contempt judgment of the district court because an evidentiary hearing was improperly denied

prior to judgment of contempt, and in violation of petitioner's right to due process. This court should issue a writ of certiorari to correct this erroneous ruling.

Conclusion

The Supreme Court of the United States should grant the Petitioner a Writ of Certiorari to review all of the issues raised herein.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85–1762
IN RE GRAND JURY PROCEEDINGS

CAMPAIGNER PUBLICATIONS, INC., ET AL.,
Appellants.

No. 86–1047
No. 86–1170
IN RE GRAND JURY PROCEEDINGS

CAUCUS DISTRIBUTORS, INC.,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. A. David Mazzone, *U.S. District Judge*]

Before
Bownes, Breyer and Torruella,
Circuit Judges.
July 3, 1986

BOWNES, *Circuit Judge.* These three consolidated appeals have been taken from judgments of civil contempt against appellants Campaigner Publications, Inc., Fusion Energy Foundation, National Democratic Policy Committee, and Caucus Distributors, Inc., all organizations associated with Lyndon LaRouche. The contempt judgments were imposed by the United States District Court for the District of Massachusetts due to the failure of the appellants to cooperate with a grand jury investigation into possible credit card fraud by these and other LaRouche related entities. These organizations are suspected of obtaining hundreds of thousands of dollars in interest-

free loans from credit card banks. The loans were allegedly obtained by fraudulently altering small credit card purchases or donations from persons interested in Lyndon LaRouche to reflect a charge for a large sum. The sums thus obtained were ultimately returned to the credit card bank *sans* accrued interest after the owner of the credit card informed the bank that the charge was not authorized.

Contempt proceedings began in district court in March of 1985. By late January of 1986, three separate judgements of contempt had been entered, each relating to a different period during which certain of the organizations had refused to cooperate with the grand jury. Appeal No. 85–1762 was filed by all four appellants and pertains to the intial contempt judgment and the first partial judgment, both entered in the spring of 1985. Appeal No. 86–1047 involves the second order of partial judgment entered in November, 1985. Appeal No. 86–1170 concerns the further judgment and commitment entered in January, 1986. Appeals Nos. 86–1047 and 86–1170 were brought by Caucus Distributors only. We shall consider each of these judgments in turn.

Appeal No. 85–1762

The events leading to the intial contempt order and first partial judgment began on January 30, 1985, when the United States Marshals attempted to serve keeper of the records grand jury subpoenas at the New York headquarters of six LaRouche related organizations: Campaigner Publications, Inc.; Caucus Distributors, Inc.; Fusion Energy Foundation; National Democratic Policy Committee; The LaRouche Campaign; and Independent Democrats for LaRouche. The Treasurer of The LaRouche Campaign and Independent Democrats for LaRouche told the marshals that no one was authorized to accept service at that time. The next day a news article about the subpoenas appeared in a Campaigner publication, New Solidarity. On February 6, 1985, one day before the return date of the subpoenas, the United States Marshals again attempted to serve the subpoenas. The subpoenas were left with a receptionist who

would not allow the marshals into the office area but told them that she was authorized to accept service. At the grand jury hearing the next day, no witnesses appeared. On February 8, 1985, the United States Attorney sent letters by overnight mail to the keepers of the records of the organizations rescheduling the grand jury appearances for February 14, 1985. Again, no witnesses for appellants appeared when the grand jury reconvened.

The government then moved for an order to show cause in the District Court of Massachusetts and served the motion on the four organizations. The district court granted the motion and set a hearing for March 29, 1985. On March 19, 1985, the order was served on a woman at appellants' office who stated that appellants would receive the order from her. Prior to the March 29 hearing, the district court received correspondence from attorneys for some of the subpoenaed organizations requesting a hearing and claiming that service of process for both the subpoenas and the show cause order had not been completed on those organizations. Appellants, however, did not appear at the March 29 show-cause hearing. At that hearing, the district court found that appellants had each been served with the grand jury subpoena and that their failure to comply was without just cause. The court then found each of the four organizations in contempt and ordered each "to pay the sum of $10,000 per day to the Clerk of the United States District Court for Massachusetts until such time as [each organization] . . . shall fully comply with said subpoena." The orders were then stayed until April 2, 1985.

On April 3, appellants, still not in compliance with the subpoena, filed a motion to vacate the contempt order and to quash the subpoenas. A hearing was held that day and the court denied the motion, finding that adequate service had been made. On April 4, 1985, appellants filed a motion to purge contempt and sanctions, which stated that they "hereby accept service to appear before the grand jury." On April 9, 1985, the court ruled that "[i]n light of the acceptance of service by the respondents and their request for a reasonable time to respond to the subpoenas, I will defer action on this motion pending notice or a

report from either party that a hearing before the Grand Jury has been scheduled." Compliance with the subpoena, however, did not follow and, on April 22, 1985, the district court granted the government's motion for a partial judgment (the first partial judgment) in the sum of $70,000 against each appellant for failure to comply with the subpoena for the seven days between April 2 and April 8, 1985. Appellants had not paid any of the $10,000 per day fine imposed by the court.

On May 2, 1985, appellants filed a motion for reconsideration regarding the orders of partial judgment which indicated that compliance had commenced on April 18, 1985. On the same day, May 2, the government obtained from the clerk of the district court a certification for registration in another district of the initial contempt judgment issued March 29. The certification stated that no notice of appeal had been timely filed as to the March 29 judgment. This judgment was then registered in the Southern District of New York and a restraining notice obtained freezing a number of appellants' bank accounts. The face of the restraining notice states that on March 29, 1985, a judgment in the amount of $70,000 had been obtained. On May 13, 1985, appellants filed a motion to annul the certification and for sanctions. On May 21, 1985, appellants filed a motion to quash the subpoena duces tecum. That same day a hearing was held on the pending motions. On July 19, 1985, the district court issued an order denying appellants' motion to purge contempt, filed April 4, their motion to reconsider the first partial judgment, filed May 2, their motion to annul certification, filed May 13, and their motion to quash the subpoena, filed May 21. On August 2, 1985, appellants appealed the March 29 initial contempt judgment, the April 22 partial judgment for $70,000, and the July 19 denials of the motions to reconsider, to annul, and to quash.

In an order dated December 5, 1985, this court dismissed the appeal of the March 29 initial contempt judgment as untimely and the denial of the motion to quash as nonappealable. The appeal of all the other orders and judgments was permitted to proceed.

We now focus on the April 22 partial judgment for $70,000. Appellants' sole argument against the April 22 judgment is based upon its attack on the underlying contempt order issued March 29. Appellants claim that they were never properly served with either the grand jury subpoena or the order to show cause and that since the $70,000 partial judgment rests upon an invalid order, it too is invalid. Appellants also attack this court's decision to dismiss the March 29 judgment as untimely, arguing that because the motion to purge contempt was still technically pending until it was officially denied on July 19, the time for appeal was tolled during this period under Federal Rule of Appellate Procedure 4(4).[1]

Our December 5, 1985 decision to dismiss the appeal of the March 29 order is binding upon us under the doctrine of the law of the case. *See generally* J. Moore, J. Lucas, & T. Currier, 1B Moore's Federal Practice ¶ 0.404 (1984). To elucidate our previous order, however, we point out that while a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) will serve to toll the time for appeal under Federal Rule of Appellate Procedure 4(4), only motions which draw "into question the correctness of the judgment [are] . . . functionally a motion under Civil Rule 59(e)." 9 Moore's Federal Practice ¶ 204.12[1] at 4–67. Appellant's motion to purge contempt was not meant to alter the judgment, rather it was an attempt to obey the contempt order and stop the accumulation of the fine. As such, it could not toll the time for appeal.

The consequence of our dismissal of the appeal of the March 29 judgment for appellants is that they are precluded from arguing the service of process issues either as to the grand jury subpoenas or the show cause order. Nor can appellants boot-

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[1] Federal Rule of Appellate Procedure 4(4) provides in pertinent part:

If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motin is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.

strap these issues into their appeal of the April 22 partial judgment. That judgment was based on appellants being in contempt for the period of April 2 through April 8. Since appellants do not contest the actual contempt finding, their appeal of the April 22 judgment fails.

We turn next to the appeal of the denial of appellants' motion to annul the certification. Appellants' basic argument is that the district court's certification of the March 29 contempt judgment was premature. Certification of judgments is governed by 28 U.S.C. ¶ 1963 (1982):

> A judgment in any action for the recovery of money or property now or hereafter entered in any district court which has become final by appeal or expiration of time for appeal may be registered in any other district by filing therein a certified copy of such judgment.

A judgment may not be certified for registration, therefore, if the time for appeal has not yet expired. Appellants have argued below and before us that the time for appeal of the March 29 judgment had not expired either because of the pendency of the motion to purge or because a motion for reconsideration of the April 22 partial judgment was filed on May 2, the same day as the certification and within the ten-day appeal period. Neither of these arguments has any merit. As already discussed, the pendency of the motion to purge, if indeed it was really pending, did not serve to toll the time for appeal of the March 29 judgment. Nor could a motion for reconsideration of the April 22 judgment, even if filed within ten days of that judgment, have any effect upon the appeal period for the March 29 judgment.

Nonetheless, we must find that the certification was premature. Our finding rests upon the rule, not referred to by any of the parties, that, where the United States is a party in a civil case, the time for filing a notice of appeal by *any party* is extended to sixty days. Fed.R.App.P. 4(a)(1).[2] Since the United

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[2] Federal Rule of Appellate Procedure 4(a)(1) provides:

States initiated the contempt proceedings and requested the judgments, it is clearly a party to these proceedings. Consequently, the time for appeal of the March 29 judgment had not expired on May 2 when the clerk's office certified the judgment.

Although appellants did not specifically point the court to the sixty-day appeal period, they did make the argument that the certification was premature because the period for filing a notice of appeal had not expired. This was sufficient to bring to our attention what, in any event, must be considered "plain error." *See, e.g., MacEdward* v. *Northern Electric Co., Ltd.*, 595 F.2d 105, 109–10 (2d Cir. 1979) ("an appellate court has the power to notice fundamental errors at trial even if the parties do not raise them on appeal"); *Harris* v. *Smith*, 372 F.2d 806, 815 (8th Cir. 1967) ("It is within the discretion of this court to notice plain error in civil appeals"). *Cf. Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976) (court has power to review jury instructions to which no objection was made, but "rule should be applied sparingly"). We, therefore, find that the certification of the March 29 judgment was improper. We, of course, do not have the power to lift the restraining notice issued by the United States District Court for the Southern District of New York freezing appellants' bank accounts. That court, however, should be informed that the certification received was invalid.

We also note that the restraining notice issued by the Southern District of New York indicates that the March 29 judgment was for $70,000. That judgment, however, was not for $70,000, but for $10,000 per day starting April 2 until there was compliance with the subpoena. It was not until the April 22 judgment that there was any definite determination by the court that

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In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; *but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry.* If a notice of appeal is mistakingly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted. [Emphasis added.]

compliance had not occurred and a specific dollar judgment was issued. The April 22 $70,000 judgment could not be certified on May 2 under any of the time limits of the rule. It appears that either the clerk's office or the United States Attorney may have mistakenly forwarded the April 22 judgment to the Southern District of New York with the certification of the March 29 judgment, leading that court to believe that the $70,000 judgment was final. This error should be corrected.

Appeal No. 86–1047

In this appeal, Caucus Distributors challenges the district court's grant of a second partial judgment on November 22, 1985, while the appeal of the initial contempt order and the first partial judgment were still pending. We begin by setting out the events leading to the second partial judgment. The United States first moved on April 25 for a second partial judgment for noncompliance with the grand jury subpoena during the period of April 9 through April 24. No action was taken by the district court on this motion. In the meantime, appellants filed their notice of appeal as to the contempt judgment and the first partial judgment. Appellants then unsuccessfully sought a stay of the judgments and execution on the judgments from both the district court and this court. Sometime during the fall of 1985, a keeper of the records for Caucus Distributors did appear before the grand jury. The government felt, however, that this still did not constitute compliance because the witness had only been appointed to that position a few days before testifying and could not provide the requested information. The government, therefore, renewed its motion for a second partial judgment in the sum of $150,000 for Caucus' failure to comply with the subpoena between April 9 and April 25. This motion was granted by the district court on November 22. On December 5, this court issued an order dismissing appellants' appeal of the March 29 contempt judgment as untimely.

Appellant's challenge the second partial judgment on two grounds: the same service of process arguments raised against the first partial judgment and the argument that the district

court ought not to have issued a second partial judgment while the appeals of the underlying contempt judgment and the first partial judgment were pending. As to the first ground, the service of process issues can no more be raised against the second partial judgment than they could against the first partial judgment. This leaves for consideration appellant's claim that the district court had no authority to issue the second partial judgment because of the pending appeals.

While the filing of a notice of appeal "divests the district court of its control over those aspects of the case involved in the appeal," *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982), an untimely, impermissible or frivolous appeal does not vest jurisdiction in the court of appeals. *United States* v. *Ferris*, 751 F.2d 436, 440 (1st Cir. 1984); *Ruby* v. *Secretary of the United States Navy*, 365 F.2d 385 (9th Cir. 1966); *Benitez* v. *Bank of Nova Scotia*, 125 F.2d 519, 522 (1st Cir. 1942). We have found some authority open to the interpretation that a timely appeal of the March 29 underlying contempt judgment would have divested the district court of jurisdiction to issue further partial judgments stemming from that contempt judgment. *Cf. United States* v. *Thorp*, 655 F.2d 997 (9th Cir. 1981) (district court divested of authority to impose criminal contempt where appeal of civil contempt for similar conduct in same proceedings was still pending); *but cf. Hoffman, Etc.* v. *Beer Drivers & Salesman's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976) ("in the kinds of cases where the court supervises a continuing course of conduct and where as new facts develop additional supervisory action by the court is required, an appeal from the supervisory order does not divest a district court of jurisdiction to continue its supervision, even though in the course of that supervision the court acts upon or modifies the order from which the appeal is taken"). In this case there was no timely appeal of the March 29 judgment. Nor can the timely appeal of the April 22 judgment be considered to in any way draw into question the validity of the November 22 judgment. Each was based on a finding that the appellant was in contempt during a particular period of time. Appellant's attempt to bootstrap the service of process issues into its appeal of both partial

judgments will not work to divest the district court of its continuing authority to enforce the initial contempt order.

Appeal No. 86–1170

In this appeal, Caucus Distributors challenges the further judgment and commitment issued by the district court on January 22, 1986, finding Caucus in contempt of a court order to compel and fining it an additional $5,000 per day until full compliance was reached. The government had moved for the order to compel on November 12, 1985. At issue was the production by Caucus of index cards related to fund raising activities. Grand jury testimony by the keeper of records had revealed that fund raisers working at Caucus offices around the country kept the names of potential and actual donors on index cards, along with various other information including amounts donated. This information was of particular interest to the grand jury in its investigation into the possible involvement of Caucus in the credit card overcharge scheme. The keeper of the records, however, did not turn these index cards over to the grand jury. He claimed that he could not turn the cards over because Caucus was not in possession of the cards. The cards were in the hands of the individual fund raisers, who allegedly considered themselves and were considered by Caucus to be independent consultants rather than employees of Caucus. The fund raisers claimed the cards as their personal property and asserted that both their first and fifth amendment rights would be infringed if they were compelled to turn them over. Caucus fully concurred in and supported the claims of the individual fund raisers.

The government asserted, as the basis for its motion to compel, that the index cards were corporate documents since they were used for corporate fund raising by persons working solely for Caucus and paid a regular salary by Caucus. Caucus responded to the government's motion to compel with a motion for a protective order asserting that the cards were not corporate records and were protected from compelled disclosure by the first and fifth amendment rights of their owners. This motion

was accompanied by two detailed affidavits from Caucus fund raisers claiming that they were self-employed political consultants and that the index cards were their personal property. The affidavits stated that some of the cards contained the names of longtime personal political contacts obtained long before any association with Caucus and that most of the information on the cards was personal in nature. The affidavits asserted that having to reveal this information to the grand jury would invade the privacy of these contacts, subject them to harassment by the FBI investigating the credit card scam, violate the first amendment rights of both the fund raisers and the contacts, and destroy the professional credibility of the fund raisers with their contacts. The motion also contained affidavits from persons who had loaned money to the LaRouche campaign and had been intimidated by visits from FBI agents investigating the credit card scam.

On November 22, the district court granted the government's motion to compel, finding that the index cards were corporate documents covered by the subpoena and that Caucus was required to produce these cards under penalty of further sanctions. Four days later, the United States Attorney wrote Caucus' attorney stating that he would not conduct indiscriminate interviews with everyone named on the cards and that he would be willing to review cards which did not contain any fund raising information and exempt them from production. Caucus then moved in district court for a protective order limiting the government's investigative use of the cards to contributors who voluntarily contacted the government concerning the commission of a criminal act. On December 6, the district court entered a memorandum and order denying Caucus' second motion for a protective order. The district court stated:

> After several hearings and exchanges of documents, I am familiar with the grand jury investigation. I have stated my concern, and I recognize the potential for improper use of the grand jury. Because of the *ex parte* and non-adversarial nature of its proceedings, and given the importance of the First Amendment rights asserted here by the movant, I have reviewed

> portions of the grand jury transcripts *in camera* and have called for affidavits and representations and I am satisfied that the grand jury proceedings are directed to a legitimate inquiry into alleged criminal activity and the proceedings are being conducted in a proper, even if irregular course, a course for which the continuing contentions of the movant and others aligned with it, are at least partially responsible.

On December 11, the government moved for a third partial judgment on the original contempt order and an additional $5,000 per day fine for Caucus' failure to comply with the order to compel. On December 16, the government moved for an order to show cause why Harley Schlanger, an officer and director of Caucus, should not be held in contempt for failure to comply with the subpoena and the order to compel. The government claimed that Schlanger and Caucus had either sanctioned or encouraged the refusal of the fund raisers to turn over the index cards and had not taken any real steps to force the fund raisers to turn them over, such as disciplining them. A hearing was scheduled for December 30 on this motion. The motion for the third partial judgment was granted on December 19.

In its opposition to the government's motion for further sanctions, Caucus requested that the district court reconsider its November 22 determination that the index cards were corporate documents. Caucus offered to bring up some of the fund raisers to testify on this issue, although in a footnote it indicated that some of the fund raisers had requested a court order prohibiting the government from serving personal subpoenas upon them while they were in Boston. The possibility of such subpoenas, Caucus asserted, would have a chilling effect on its ability to get these fund raisers to testify. Although both Caucus' motion for reconsideration and the show cause order were considered at the December 30 hearing, no testimonial evidence was taken. A second hearing was held on January 17, 1986, to consider the government's motion for further sanctions. The district court denied Caucus' request for an evidentiary hearing and granted the government's motion for an additional $5,000 per day fine

for Caucus' continuing failure to either produce the index cards or seriously attempt to get their fund raisers to release them.

Caucus now argues that the district court violated its due process rights by adjudging it in contempt of the order to compel without allowing it an evidentiary hearing at which it could present the testimony of the fund raisers on the question of whether the index cards were personal or corporate documents. Caucus does not present as a question for review the district court's determination that the index cards were corporate documents. It asserts, however, that the evidence it submitted in the form of affidavits and letters sufficiently cast doubt upon the ownership of the index cards so as to require the district court to hold an evidentiary hearing on the question.

There is general agreement that due process requires that a potential contemnor be given notice and a hearing regardless of whether the contempt is civil or criminal in nature, *In re Oliver*, 333 U.S. 257, 275 (1948); *In re Sadin*, 509 F.2d 1252, 1255 (2d Cir. 1975); *United States* v. *Alter*, 482 F.2d 1016, 1023 (9th Cir. 1973), unless the contempt is committed in open court and tends to "demoralize" the court's authority, in which case punishment can be imposed summarily, *In re Oliver*, 333 U.S. at 274–75; *Ex Parte Terry*, 128 U.S. 289 (1888). Whether a contemnor has the right to call witnesses at an evidentiary hearing before being adjudged in civil contempt and subjected to a fine, however, is a question which has rarely been addressed by the courts. In the context of criminal contempt, where the penalty was imprisonment for a set period of time, the Supreme Court has said that the right to a hearing included "the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." *Cooke* v. *United States*, 267 U.S. 517, 537 (1925). *See also In re Green*, 369 U.S. 689, 691–93 (1962) (quoting *Cooke*). In cases involving the imposition of civil contempt in the grand jury context, where the penalty has been confinement of the uncooperative witness until there is compliance with the grand jury subpoena, due process has been considered by many courts to require an "uninhibited adversary

hearing" where the witness can "probe all nonfrivolous defenses to the contempt charge." *United States* v. *Alter*, 482 F.2d 1016, 1024 (9th Cir. 1973).

Nonetheless, in the civil contempt context, less than full adversary hearings have been held to comport with due process under certain circumstances. The Second Circuit has held that a full adversary hearing, including the right to call witnesses, is not necessary where the facts surrounding the contempt are undisputed and cannot be further elucidated by evidence. *In re Rosahn*, 671 F.2d 690, 695 (2d Cir. 1982) (contempt stemming from refusal to submit to photographing and fingerprinting and to provide hair and handwriting samples does not require full adversary hearing). The Seventh Circuit has also found that an evidentiary hearing is not required in a civil contempt proceeding where documentary evidence clearly established the contempt and no material issues of fact were raised. *Commodity Futures Trading Commission* v. *Premex, Inc.*, 655 F.2d 779, 782 (7th Cir. 1981). It has also been held that failure to request an evidentiary hearing waives any right to claim a due process violation on appeal. *American Fletcher Mortgage Co., Inc.* v. *Bass*, 688 F.2d 513, 520 (7th Cir. 1982). A full evidentiary hearing has been refused by this court when it would seriously impair the grand jury process. *In re Lochiatto*, 497 F.2d 803, 807–08 (1st Cir. 1974) (secret and sensitive nature of surveillance information may require district court to review material *in camera* rather than allow defendant access).

A right to call witnesses or to have an evidentiary hearing is most often found where controverted factual issues lie at the heart of the contempt. *Accord United States* v. *Alter*, 484 F.2d at 1023; *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook Railroad Co.*, 380 F.2d 570, 578 (D.C. Cir.), *cert. denied*, 389 U.S. 970 (1967). In a recent case before the Second Circuit involving the credibility of a witness who claimed he could not remember information sought by the grand jury, the court held that

> [t]he witness should also have the right to call any other witnesses whose testimony might be relevant to

> his defense. Of course, the district judge may require that before a third party is permitted to take the stand, an offer of proof demonstrating the relevancy of the proposed testimony be made and, considering the exigencies of any grand jury proceeding, the district judge would have very broad discretion. In addition, counsel for the allegedly recalcitrant witness should have the opportunity to present the defense's view of the evidence and of any legal issues, either by oral argument or in memoranda. Again, it is within the discretion of the court to control the extent and form of these presentations.

In Re Kitchen, 706 F.2d 1266, 1273 (2d Cir. 1983).

We must now determine whether the district court's denial of an evidentiary hearing denied Caucus due process or whether the particular circumstances of this contempt justified less than a full adversary hearing. It is Caucus' contention that because the factual dispute about the nature of the index cards was the key to its "just cause" defense for noncompliance, the district court should have allowed some of the fund raisers to testify concerning their contention that the index cards were personal property. The government contends that in light of the detailed affidavits offered by two of the fund raisers, as well as the numerous attorney letters asserting the personal ownership of the index cards by various other fund raisers, testimony by such individuals would not have added anything to Caucus' defense. The government also points out that, although Caucus offered to have these individuals come to Boston to testify, it requested that the district court protect them from individual subpoenas and suggested that failure to do so might prevent such testimony. The government suggests that this request for an evidentiary hearing was another of Caucus' "stonewalling" tactics, that the witnesses would almost certainly not have appeared, and that after almost a year of supervising this grand jury investigation the district court could properly avoid this predictable and unnecessary delay.

Although this is a close case, we agree with the government that Caucus' due process rights were not violated by the denial

of an opportunity to have the fund raisers testify about the nature of the index cards. The basic position of the fund raisers was set out in the affidavits and letters. The fundamental question which the court had to decide was whether the cards were sufficiently involved in Caucus' business of fund raising so that they could be considered corporate documents regardless of their prior uses or ownership. Some courts which have been faced with a question as to the personal or corporate nature of documents have resolved the question by an *in camera* inspection of the documents themselves. *E.g.*, *United States* v. *MacKey*, 647 F.2d 898, 899 (9th Cir. 1981). This would have been the best way to determine the status of these documents. Caucus did not, however, offer to allow the district court to inspect the index cards. Because of the likely repetitiveness of the fund raisers' testimony, the real probability that they would not appear at all, and the overall delay in the grand jury proceedings already caused by Caucus' and the other organizations' refusal to produce anything until forced to do so, we find the district court's decision to deny an evidentiary hearing did not violate Caucus' due process rights.

Affirmed in part, reversed in part. Remanded to the district court for further proceedings consistent with this opinion.

Adm. Office, U.S. Courts—Blanchard Press, Inc., Boston, Mass.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85–1762
IN RE GRAND JURY PROCEEDINGS

CAMPAIGNER PUBLICATIONS, INC., ET AL.,
Appellants.

No. 86–1047
No. 86–1170
IN RE GRAND JURY PROCEEDINGS

CAUCUS DISTRIBUTORS, INC.,
Appellant.

Before
Bownes, Breyer and Torruella,
Circuit Judges.

ORDER OF COURT
Entered August 5, 1986

The petition for rehearing is denied.

Appellants argue that our opinion incorrectly considered the April 4, 1985 motion to purge contempt as something other than a Rule 59 motion to alter or amend the contempt judgment. If it had been a Rule 59 motion, the period for appeal might have been tolled sufficiently so as to preserve their appeal on the service of process issues. We are convinced that this was not a Rule 59 motion. To begin with, a Rule 59 motion to vacate the contempt order and quash the subpoena was filed and denied on April 3, 1985. It seems unlikely that appellants would have filed the exact same motion the very next day. Furthermore, the motion was not treated as a Rule 59 motion by the district court; if it had been, it would have been summarily denied again. The district court viewed it, as we did, as a request to

avoid the consequences of an acknowledged contempt by obey ing the subpoena. That is precisely why the district court de layed its decision. It wanted to see whether compliance woul follow. Appellants may have intended to preserve their right on the service of process issues, but those issues were not befor the district court on April 4, 1985.

Appellants also argue that the service of process issues wer still before the district court when it granted the partial sum mary judgments and that these issues were properly brought u for review through the timely appeal of these judgments. Th partial judgments were simple monetary awards based upo noncompliance with the subpoena during a specified period o time. Once the district court denied the April 3, 1985 motion t vacate and appellants accepted service as part of their motion t purge on April 4, 1985, so as to stop the contempt clock, th service issue was settled for the district court. Although a find ing on appeal of lack of proper service of the subpoena woul have undercut these judgments, nonetheless, that issue wa decided separately and had to be appealed separately.

By the Court,
FRANCIS P. SCIGLIANO
Clerk.
By: Richard W. Gordon
Chief Deputy Clerk

[cc: Messrs. Feinberg, Aronson and Small

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE GRAND JURY SUBPOENA **M.B.D. No. 85–203**
(Campaigner Publications, Inc.)

JUDGMENT AND COMMITMENT

On March 14, 1985, this Court, "Ordered that on or before the 29th day of March, 1985 at 9:30 a.m. Campaigner Publications, Inc. shall appear before this Court and show any cause why he should not be held in contempt of this Court for refusing to comply with the Grand Jury subpoena *duces tecum* lawfully issued and served upon it by failing to appear and to answer questions or produce documents before the Grand Jury, provided that a copy of this Order is served upon Campaigner Publications, Inc. or its counsel on or before the 26th day of March, 1985."

Said Order was served on Campaigner Publications, Inc. on March 19, 1985, and no response has been received. At the hearing held pursuant to the Order on March 29, 1985, Campaigner Publications, Inc. failed to appear or otherwise provide any justification for its continued failure to comply with the subpoena. Having reviewed the record in this case, the Court *finds*:

1. The witness, Keeper of the Records of Campaigner Publications, Inc., has been served with a lawful and proper grand jury subpoena calling for the production of certain relevant records.

2. Said witness has refused, without just cause or adequate excuse, to comply with this subpoena, in that the witness has repeatedly failed to appear or make any other appropriate response.

3. Said witness was served with the government's Motion for an Order to Show Cause on March 15, 1985, by certified mail.

4. Said witness received adequate notice pursuant to Rule 42(b), Fed.R.Crim.Proc., when the United States Marshals served this Court's Order to Show Cause on it on March 19, 1985.

IT IS THEREFORE ADJUDGED that Campaigner Publications, Inc. is in direct and continuing contempt of this Court for its failure to comply with the grand jury subpoena issued on February 7, 1985.

IT IS THEREFORE ORDERED that Campaigner Publications, Inc. be and hereby is ordered to pay the sum of $10,000 per day to the Clerk of the United States District Court for Massachusetts until such time as Campaigner Publications, Inc. shall fully comply with said subpoena.

This ORDER is stayed until 12:00 noon, Tuesday, April 2, 1985.

Dated March 29, 1985 A. David Mazzone

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE GRAND JURY SUBPOENA M.B.D. NO. 85–204, 205, 206, 203

MOTION TO PURGE CONTEMPT AND SANCTIONS

Respondents in the above matter hereby move this Honorable Court for an Order purging the contempt order of March 29, 1985 and to vacate the sanctions ordered therein.

In support of this motion respondents state that:

1. While they continue to assert their factual claims as per the attached Affidavits of Philip Gallagher, Warren Hamerman, and Donald Phau they hereby accept service to appear before the Grand Jury.

In light of respondents' acceptance of service they respectfully request that the contempt order be vacated and the imposition of sanctions be lifted and that they be permitted a reasonable time to respond to the subpoenas.

Respectfully submitted,
(s) Matthew H. Feinberg

MATTHEW H. FEINBERG
Segal, Moran, Feinberg,
Packham & Lobel
210 Commercial Street
Boston, MA 02109
Tel: (617) 720-4444
(Endorsed)

In light of the acceptance of service by the respondents and their request for a reasonable time to respond to the subpoenas, I will defer action on this motion pending notice or a report

from either party that a hearing before the Grand Jury has bee
scheduled.

(s) A. David Mazzone
USDJ
4/9/85

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE GRAND JURY **M.B.D. NO. 85–204**
(CAUCUS DISTRIBUTORS, INC.)

ORDER TO COMPEL

On Motion of the United States, and upon consideration of the pleadings before it, this Court hereby finds and ORDERS:

(1) That any and all documents relating to fundraising by, for, through, or on behalf of any entity, including Caucus Distributors, Inc. ("CDI"), are records of that entity and *not* personal records of the documents' makers;

(2) That all such documents, including the "index cards" referred to in Mr. Greenspan's testimony and the government's Motion to Compel, are therefore covered by the outstanding grand jury subpoena and contempt;

(3) That CDI, the Keeper of Records of CDI Elliot Greenspan, and Elliot Greenspan personally, are hereby Ordered and Compelled to produce all such documents to the grand jury on or before December 2, 1985;

(4) That should CDI, the Keeper of Records of CDI Elliot Greenspan, or Elliot Greenspan personally, refuse or fail to comply with this Order and produce all such documents to the grand jury on or before December 2, 1985, this Court will hear and receive motions for further contempt sanctions, civil and criminal, against any of the above.

November 22, 1985 A. David Mazzone
DATE U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE GRAND JURY SUBPOENA **M.B.D. No. 85–204**
(CAUCUS DISTRIBUTORS, INC.)

FURTHER JUDGMENT AND COMMITMENT

Upon motion of the United States of America and review of the record before it, this Court hereby *finds*:

1. By Order dated March 29, 1985, this Court held Caucus Distributors, Inc. ("CDI") in contempt of Court for its failure to comply with a lawful grand jury subpoena, and Ordered that CDI pay the sum of $10,000 per day until it fully complied with the subpoena.

2. CDI has failed to comply with the subpoena and has failed to pay the fines as ordered.

3. On November 22, 1985, as part of the continuing proceedings in this matter, this Court issued an Order to Compel the production of certain records, stating that if all such records were not produced by December 2, 1985, the Court would consider further sanctions.

4. CDI has failed to comply with the Order to Compel, as well as the underlying grand jury subpoena and contempt order.

IT IS THEREFORE ADJUDGED that Caucus Distributors, Inc. remains in direct and continuing contempt of this Court for its failure to comply with the grand jury subpoena issued on February 7, 1985.

IT IS THEREFORE ORDERED that Caucus Distributors, Inc. be and hereby is ordered to pay the additional sun of $5,000 per day to the Clerk of the United States District Court for Massachusetts until such time as Caucus Distributors, Inc. shall fully comply with said subpoena.

This ORDER is stayed until 12:00 noon, January 23, 1986.

Dated: January 22, 1986

A. David Mazzone
U.S. DISTRICT COURT

No. 86-738

In the Supreme Court of the United States

OCTOBER TERM, 1986

CAUCUS DISTRIBUTORS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a motion to purge contempt constitutes a motion under Fed. R. Civ. P. 59(e) "to alter or amend" a judgment and thus tolls the time within which to appeal from a contempt judgment.

2. Whether petitioner Caucus's due process rights were violated when the district court refused to permit it to present live testimony during a contempt hearing.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 795 F.2d 226.

JURISDICTION

An order of the court of appeals dismissing petitioners' appeal from the March 29, 1985, contempt judgment of the district court was entered on December 5, 1985. The judgment of the court of appeals disposing of petitioners' other appeals from various district court orders was entered on July 3, 1986, and a petition for rehearing was denied on August 5, 1986 (see Pet. App. A17-A18). The petition for a writ of certiorari was filed on November 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, four organizations associated with Lyndon LaRouche, are the subjects of a grand jury investigation

into allegations of credit card fraud. After petitioners failed to comply with grand jury subpoenas duces tecum, they were held in civil contempt and fined $10,000 for each day of noncompliance. Additionally, when petitioner Caucus Distributors, Inc. (Caucus) refused to comply with an order compelling it to produce certain records to the grand jury, it was separately adjudged in contempt and was fined an additional $5,000 per day.

1. The complex procedural history of this case is summarized in the opinion of the court of appeals (Pet. App. A1-A16). On January 30, 1985, United States Marshals attempted to serve grand jury subpoenas on petitioners at their New York headquarters. Service was refused. Thereafter, on February 6, 1985, one day before the return date of the subpoenas, Marshals again attempted to serve the subpoenas, this time leaving them with a receptionist who stated that she was authorized to accept service. Nonetheless, no witnesses for petitioners appeared before the grand jury the next day. The United States Attorney adjourned the return date on the subpoenas until February 14, but no witnesses for petitioners appeared on that date, either. Pet. App. A2-A3.

The government then moved for an order to show cause why petitioners should not be held in contempt and served the motion on petitioners. The district court granted the motion and set a hearing for March 29, 1985. On March 19, the order to show cause was served on a woman at petitioners' office who stated that petitioners would receive the order from her. Again, however, no representative of any of the petitioners appeared at the March 29 hearing. At the close of the hearing on that date, the district court found that each of the petitioners had been properly served and that their failure to comply with the subpoenas was without just cause. The court therefore held peti-

titioners in contempt and ordered each to pay $10,000 per day until it complied with the subpoenas. The court stayed its order until April 2, 1985. Pet. App. A3, A19-A20.

On April 3, 1985, petitioners, still not in compliance with the grand jury subpoenas, moved to vacate the contempt order and quash the subpoenas. Following a hearing on that date, the district court denied the motion, finding once more that petitioners had been adequately served. On the following day, April 4, petitioners made a new motion, this time to "purge contempt and sanctions." In their motion papers, petitioners agreed to accept service to appear before the grand jury. On April 9, 1985, the district court ruled that in light of petitioners' acceptance of service of process, it would "defer action on [petitioners'] motion pending notice * * * from either party that a hearing before the Grand Jury has been scheduled." In the days that followed, however, petitioners continued their noncompliance with the subpoenas. Accordingly, on April 22 the district court entered a partial judgment of $70,000 against each of the petitioners for failure to comply with the subpoenas during the period between April 2 and April 8, 1985. Pet. App. A3-A4, A21-A22.

On May 2, 1985, petitioners moved for reconsideration of the April 22 orders of partial judgment and represented to the court that they had commenced compliance with the subpoenas on April 18. On May 21, however, petitioners once again moved to quash the subpoenas. On July 19, 1985, the district court denied petitioners' April 4 motion to purge contempt, their May 2 motion to reconsider the court's entry of partial judgment, and their May 21 motion to quash the subpoenas.

On August 2, 1985, petitioners appealed the district court's March 29 contempt judgment, the April 22 partial judgment of $70,000, an order authorizing the government to register the March 29 contempt judgment in the Southern District of New York, and those parts of the July

19 order that denied the motions to reconsider the partial judgment and to quash the subpoenas. In an unpublished order issued on December 5, 1985, the court of appeals dismissed as untimely petitioners' appeal of the March 29 contempt judgment and held that the trial court's July 19 order denying petitioners' motion to quash the subpoenas was not appealable. Pet. App. A4.

2. In addition to the subpoenas noted above, the grand jury also subpoenaed from petitioner Caucus certain index cards listing the names of potential and actual donors to petitioners' enterprises. The records custodian for Caucus refused to produce the cards, claiming they were not in petitioner's possession but rather were maintained by independent fundraisers, who were not Caucus employees. Pet. App. A10. On November 12, 1985, the government moved for an order to compel production of the index cards. It asserted that the cards were producible as corporate documents. Caucus contended that the cards were the personal property of the individual fundraisers and that production of the cards would infringe the fundraisers' First and Fifth Amendment rights. In support of that claim, Caucus attached detailed affidavits from two Caucus fundraisers and from third parties who had lent money to the LaRouche campaign. Caucus also submitted letters prepared by attorneys for various LaRouche fundraisers, asserting that their clients were the personal owners of the index cards. Pet. App. A10-A11, A15.

On November 22, 1985, the district court granted the government's motion to compel. The court found that the index cards were producible as Caucus's corporate documents and held that Caucus's continuing refusal to produce the records would lead to additional sanctions.[1]

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[1] In its November 22 order, the district court also entered a second partial judgment of $150,000 against each of the petitioners for their continuing failure to comply with the earlier grand jury subpoenas between April 9 and April 25, 1985.

Thereafter, Caucus sought a protective order limiting the government's investigative use of the cards. On December 6, the district court denied that motion.

On December 11, the government moved for the imposition of a $5,000 per day assessment against Caucus for its failure to comply with the November 22 order to compel.[2] In opposition, Caucus asked the district court to reconsider its November 22 holding that the index cards were corporate documents. Caucus offered to present certain of its fundraisers as witnesses, as long as the court prohibited the government from serving personal subpoenas on those witnesses during the time they were in Boston. After hearings on December 30, 1985, and January 17, 1986, during which no testimony was taken, the district court granted the government's motion for sanctions. The court ordered Caucus to pay an additional $5,000 for each day of noncompliance with the grand jury subpoena for records. Pet. App. A10, A12-A13.

3. The court of appeals affirmed in part and reversed and remanded in part.[3] The court rejected as untimely (Pet. App. A5-A6) petitioners' challenge to the partial judgment of contempt issued on April 22. In so holding, the court noted, first, that its December 5, 1985, order dismissing as untimely that portion of petitioners' appeal directly attacking the March 29 contempt order was binding as the law of the case (Pet. App. A5). The court

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[2] In addition, the government requested a third partial judgment against all four petitioners arising from the March 29 contempt order. The district court granted that application. Pet. App. A8.

[3] The court of appeals reversed that portion of the trial court's decision refusing to annul the certification of the March 29 contempt judgment for purposes of registration in the Southern District of New York. The government had sought the certification so that certain of petitioners' bank accounts could be frozen (Pet. App. A4). The court of appeals held that the certification was premature, in that it was entered before the 60-day appeal period after the entry of the March 29 judgment had elapsed (Pet. App. A6-A8).

reasoned, further, that since petitioners' challenge to the April 22 judgment was predicated on the same objection that they had belatedly raised to the underlying contempt judgment of March 29, petitioners were precluded from relying on that objection in challenging the April 22 order. The court rejected petitioners' claim that their time to appeal the March 29 order had been extended, under Fed. R. App. P. 4(a)(4), by the April 4 motion to purge contempt. While Rule 4(a)(4) permits a tolling of the time to appeal where, inter alia, a party has made a motion under Fed. R. Civ. P. 59(e) "to alter or amend [a] judgment," the court held that petitioners' April 4 motion to purge contempt "was not meant to alter the [March 29] judgment, rather it was an attempt to obey the contempt order and stop the accumulation of the fine. As such, it could not toll the time for appeal" (Pet. App. A5).[4]

The court of appeals also rejected petitioner Caucus's challenge to the district court's order holding it in contempt for failing to produce the index cards. The court held that the district court did not deprive Caucus of due process by refusing to permit it to present live testimony during the contempt hearings. Pet. App. A15-A16. The court of appeals noted (Pet. App. A16) that Caucus's position had been set out in the affidavits and letters and that

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[4] In denying petitioners' petition for rehearing (Pet. App. A17-A18), the court of appeals noted that on April 3—the day before petitioners moved to purge contempt—they had expressly moved under Fed. R. Civ. P. 59 to vacate the March 29 contempt order and quash the subpoena. That motion was denied on April 3. The court thought it "unlikely that [petitioners] would have filed the exact same motion the very next day" (Pet. App. A17). Moreover, the court noted, the district court had not treated the April 4 motion as a Rule 59 motion: rather than summarily denying it as duplicative of the April 3 motion, the court had agreed to delay its ruling on that motion so as to give petitioners an opportunity to obey the subpoenas, as they had indicated they would (Pet. App. A17-A18).

additional testimony would likely have been repetitive. Moreover, the court observed, there was a "real possibility" that the witnesses would not have appeared at all, particularly in light of Caucus's insistence that the witnesses be protected from service of process during their appearance in Boston. The court concluded that in view of "the overall delay in the grand jury proceedings already caused by [petitioners'] refusal to produce anything until forced to do so * * * the [trial] court's decision to deny an evidentiary hearing did not violate Caucus' due process rights" (Pet. App. A15-A16).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or of any other court of appeals. Further review by this Court is unwarranted.

1. Petitioners contend (Pet. 5-10) that the court of appeals indulged an "overly technical reading" of Fed. R. App. P. 4(a)(4) (Pet. 6) in holding that petitioners' August 2, 1985, appeal of the district court's March 29, 1985 contempt judgment was untimely. Petitioners claim that, although not denominated as such, their April 4 motion to purge contempt was in reality a motion "to *vacate* both the contempt judgment and sanctions" and thus should have been construed as a motion under Fed. R. Civ. P. 59(e) (Pet. 7 (emphasis in original)). This claim is meritless.

As a threshold matter, petitioners' effort to seek review of the court of appeals' dismissal of the appeal from the March 29, 1985, contempt judgment is itself untimely. The court of appeals dismissed that appeal on December 5, 1985. The time for seeking review of that dismissal order therefore expired on March 5, 1986. To be sure, the court of appeals explained the basis for the December 5, 1985, dismissal in both its July 3, 1986, opinion and its August 5, 1986, order on rehearing. But those orders did not

revive petitioners' right to seek review of the December 5 dismissal order, since the court in those subsequent orders "did no more * * * than to restate what it had decided by the first one." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); see also *FCC* v. *League of Women Voters*, 468 U.S. 364, 373 n.10 (1984); *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211 (1952).

Even if the petition were timely with regard to this issue, the issue would not warrant this Court's review. Under Fed. R. App. P. 4(a)(1) petitioners had 30 days within which to file their notice of appeal from the district court's March 29, 1985, judgment of contempt. Had petitioners moved during that 30-day period to alter or amend the March 29 judgment pursuant to Fed. R. Civ. P. 59(e), that motion would have tolled the time for appeal. But not every motion made after a judgment has been entered falls within the purview of Rule 59(e). Rather, a Rule 59(e) motion—"to alter or amend" the judgment—must "question[] the substantive correctness of [the] judgment" (*Willie* v. *Continental Oil Co.*, 746 F.2d 1041, 1045 (5th Cir. 1984)). Accord *Vreeken* v. *Davis*, 718 F.2d 343, 345 (10th Cir. 1983); *St. Paul Fire & Marine Ins. Co.* v. *Continental Casualty Co.*, 684 F.2d 691, 693-694 (10th Cir. 1982). Here, the court of appeals correctly looked to the "substance" of petitioners' April 4 motion to purge contempt (Pet. 6) and held that it did not constitute a Rule 59(e) motion. As the court noted in denying the petition for rehearing (Pet. App. A17-A18), petitioners could not have intended the April 4 motion to seek an alteration or amendment of the contempt judgment, because only the previous day the district court had denied just such a motion and "[i]t seems unlikely that [petitioners] would have filed the exact same motion the very next day" (Pet. App. A17). Instead, as the court of appeals held, the motion to purge "was an attempt to obey the contempt order and

stop the accumulation of the fine" (Pet. App. A5). That was how the district judge treated the motion, since he agreed to delay further contempt orders in order to gauge petitioners' promised compliance with the subpoena (Pet. App. A18). Accordingly, the April 4 motion did not toll the time for appeal.[5]

2. Petitioner Caucus also contends (Pet. 10-15) that the district court denied it due process by refusing to permit it to present live testimony prior to holding it in contempt for failing to produce the subpoenaed index cards. The court of appeals properly rejected that contention.

As the court of appeals noted (Pet. App. A13), "due process requires that a potential contemnor be given notice and a hearing" before being held in contempt. See *In re Oliver*, 333 U.S. 257, 275 (1948). Here, petitioner received ample notice prior to the contempt citation and participated in two separate hearings—on December 30, 1985, and January 17, 1986 (Pet. App. A12). At the hearings Caucus submitted detailed affidavits from allegedly independent Caucus fundraisers, asserting that the records in question were in the fundraisers' exclusive possession (Pet. App. A11). Caucus also furnished the district court with numerous letters from attorneys who claimed that the index cards were the property of individual fundraisers (Pet. App. A15).

Petitioner nevertheless insists that the district court should have permitted it to supplement the record with live testimony buttressing its claim. The court of appeals, consistent with each of the other courts of appeals that has addressed the issue, held that such an evidentiary hearing is

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[5] The decision of the court of appeals is in accordance with the well-settled principle that motions seeking nothing more than relief from the effects of a judgment do not toll the time for appeal. *E.g.*, *Gibbs* v. *Maxwell House*, 701 F.2d 145, 146 (11th Cir. 1983); *American Security Bank* v. *John Y. Harrison Realty, Inc.*, 670 F.2d 317, 321 (D.C. Cir. 1982).

not required (Pet. App. A15-A16). Accord *In re Kitchen,* 706 F.2d 1266, 1273 (2d Cir. 1983) ("the district judge may require that before a third party is permitted to take the stand, an offer of proof demonstrating the relevancy of the proposed testimony be made and, considering the exigencies of any grand jury proceeding, the district judge would have very broad discretion"); *In re Rosahn,* 671 F.2d 690, 695 (2d Cir. 1982); *Commodity Futures Trading Comm'n* v. *Premex, Inc.,* 655 F.2d 779, 782 n.2 (7th Cir. 1981); *United States* v. *Danenza,* 528 F.2d 390, 392 (2d Cir. 1975). Moreover, petitioner has failed to show how live testimony "would [have] significantly improve[d] the accuracy of the [district court's] determination." *Schall* v. *Martin,* 467 U.S. 253, 277 (1984).

The request to present live testimony was not made in response to the government's motion to compel production of the index cards; it was made only in a subsequent motion for reconsideration of the court's order to compel production (see Pet. App. A12). The district court could properly have refused the request solely on the ground that it was untimely.

Moreover, from all that appears in the petition (Pet. 11), the proposed witnesses would simply have repeated the very claims already contained in the affidavits and letters. It is therefore difficult to understand what the witnesses would have added to the information before the district court when that court made its finding that the index cards were sufficiently involved in Caucus's fund-raising business to be deemed corporate records, regardless of their ownership (see Pet. App. A16).

Finally, as the court of appeals noted (Pet. App. A16), there was a "real possibility that [the witnesses] would not appear at all." Petitioner's request for leave to present testimony was apparently conditioned on the trial court's willingness to immunize the witnesses from grand jury process during their stay in Boston (Pet. App. A12, A15).

In light of the unjustified conditioning of petitioner's request,[6] the district court could properly be skeptical of the likelihood that the witnesses would appear at all. At a minimum, the district court could regard petitioner's unjustifiably qualified proffer of witnesses as no proffer at all. Under these circumstances, and in light of "the overall delay in the grand jury proceedings already caused by Caucus' and the other organizations' refusal to produce anything until forced to do so" (Pet. App. A16), the court of appeals correctly concluded that petitioner received all the process it was due. See *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973) (cautioning against "saddl[ing] a grand jury with minitrials and preliminary showings [that] would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws"). Cf. *United States* v. *Martin-Trigona*, 759 F.2d 1017, 1025-1026 (2d Cir. 1985) (summary imposition of criminal contempt was appropriate where witness had delayed bankruptcy proceedings for nearly three years with "frivolous appeals" and "collateral litigation").[7]

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[6] Because there is nationwide service of process for grand jury subpoenas, see Fed. R. Crim. P. 17(e), the condition petitioner sought to impose on the appearance of his witnesses was not a valid one.

[7] Petitioner also contends (Pet. 14) that the denial of a full evidentiary hearing violated the First and Fifth Amendment rights of the purported owners of the index cards. As this Court has made clear, however, a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). While "there are situations where competing considerations outweigh any prudential rationale against third-party standing," *Secretary of State* v. *J. H. Munson Co.*, 467 U.S. 947, 956 (1984), petitioner has not offered any reason why his case presents such a situation.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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